MCAT Gen Sdn Bhd v Celcom (M) Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D4–22–1682 OF 2005
ABDUL WAHAB PATAIL J
28 JUNE 2006

Civil Procedure — Injunction — Application for interlocutory injunction — Restraining defendant from entering into contract to detriment of plaintiff's appointment as reseller of defendant's services — Balance of convenience — Whether any justification to change existing state of affairs until plaintiff succeeded in its litigation

Sometime between the end of November and early December 2003, the plaintiff had approached the defendant's carrier and wholesale division to undertake a business venture to resell the defendant's services to the plaintiff's customers. Various meetings and discussions were held between the plaintiff and defendant's representatives culminating in discussion to draw up a reseller agreement on a simple reseller basis; several consignments of SIM cards were also delivered. The plaintiff, through advertisements and sales, represented that the defendant agreed with and collaborated with the plaintiff. Later while drawing up a post-paid reseller agreement, there were several issues that were not resolved and culminated in a breakdown. According to the plaintiff, on 14 October 2005, a demand letter was sent to the plaintiff by the defendant alleging that the plaintiff had misrepresented to the public by releasing newspaper advertisements, press releases and website advertisements that the defendant had collaborated and agreed with the plaintiff in launching its new prepaid package in the market, and by reason of the aforesaid the defendant intended to take steps to institute legal action and demand damages against the plaintiff. The plaintiff applied to restrain the defendant from entering into reseller agreement with other parties to the detriment of the plaintiff's rights pursuant to the appointment of the plaintiff as the reseller of the defendant's services. The plaintiff feared the defendant had ulterior motives to utilize all contributions by the plaintiff to the defendant in respect of the reseller agreement.

Held, dismissing the plaintiff's application for injunction:

(1) On the basis of the pleadings in this case, there appeared to be triable issues. When the pleadings disclose that there are triable issues, that is enough to warrant consideration of, if an application is made in respect thereof, injunctions. Now, the reality is that upon a trial the plaintiff might succeed. It is also possible the plaintiff might fail. Until a trial is held it is not possible to determine whether the plaintiff would succeed or fail (see para 12).

Furthermore, the injunction as sought is defensible if the plaintiff would succeed in this litigation. But it is not defensible if the plaintiff would fail. But since it cannot at this point of time before a trial be determined who would succeed, the question before the court is, for want of a better term, the balance of convenience (see para 13).

(2) It was submitted for the plaintiff in favour of the injunction that it would be impossible for the plaintiff to track and claim the unjust enrichment, and this should tilt the decision in favour of granting an injunction. But it was equally obvious, upon consideration, that it would be equally impossible to quantify and claim damages against the plaintiff's undertaking in respect of damages in the event the plaintiff failed in its litigation (see para 14). In other words, both alternatives had the same difficulty in working out the damages. In that event there was no justification for any order to change the existing state of affairs until the plaintiff shall have succeeded in its litigation (see para 15).

[Bahasa Malaysia summary

Antara hujung bulan November dan awal Disember 2003, plaintif telah menghampiri pembawa defendan ('defendant's carrier') dan bahagian borong untuk mengambil usaha niaga perniagaan untuk menjual servis defendan kepada pelanggan plaintif. Pelbagai mesyuarat dan perbincangan telah diadakan diantara plaintif dan wakil-wakil defendan, dimana satu perbincangan untuk membentuk perjanjian jualan balik ('reseller agreement') diatas satu penjualan balik yang asas; beberapa pengkonsainan SIM kad juga telah dihantar. Plaintif, melalui pengiklanan dan jualan telah mewakili bahawa defendan bersetuju dan telah bekerjasama dengan plaintiff. Apabila membentuk satu perjanjian penjualan balik, terdapat beberapa isu-isu yang masih belum diselesaikan dan telah menyebabkan kegagalan perundingan. Menurut plaintif, pada 14 Oktober 2005, satu surat permintaan telah dihantar kepada plaintif oleh defendan mengatakan bahawa plaintif telah menyalahgambarkan kepada orang awam dengan mengeluarkan pengiklanan, membuat kenyataan kepada akhbar dan pengiklanan web dimana defendan telah bekerjasama dan bersetuju dengan plaintif dalam melancarkan bungkusan 'prepaid package' didalam pasaran dan atas sebab-sebab tertentu, defendan ingin mengambil satu langkah undang-undang dan menuntut kerugian daripada plaintif. Plaintif telah memohon untuk menyekat defendan daripada memasuki perjanjian jual balik dengan parti-parti lain. Ini adalah kerana ia boleh menjejaskan hak-hak plaintif berikutan perlantikan plaintif dalam penjualan balik servis-servis defendan. Bagi plaintif, defendan dikatakan mempunyai motif-motif berbahaya untuk menggunakan kesemua sumbangan oleh plaintif kepada defendan berkenaan perjanjian jualan balik.

Diputuskan, menolak permohonan plaintif bagi satu injuksi:

(1) Berdasarkan pliding-pliding kes ini, wujud isu-isu yang boleh dibicarakan. Apabila pliding mendedahkan bahawa terdapat isu-isu yang boleh dibicarakan,

adalah mencukupi untuk satu permohonan injuksi. Sekarang, berdasarkan perbicaraan, plaintif mungkin berjaya. Kemungkinan juga, plaintiff akan gagal. Sehingga satu perbicaraan diadakan, adalah tidak berkemungkinan untuk menentukan sama ada plaintif akan berjaya or tidak (lihat perenggan 12). Tambahan pula, injuksi seperti yang dipohon boleh dipertahankan jikalau plaintif boleh menang dalam litigasi ini. Tetapi tidak boleh dipertahankan jikalau plaintif gagal. Tetapi jikalau pada masa ini tidak boleh ditentukan sebelum perbicaraan siapa akan menang, persoalan di hadapan mahkamah adalah, imbangan kesesuaian (lihat perenggan 13).

(2) Plaintif berhujah dengan menyokong injuksi bahawa adalah tidak berkemungkinan bagi plaintif untuk menuntut pengkayaan tak patut dan keputusan adalah untuk memberi injuksi. Tetapi adalah mustahil untuk menuntut kerugian terhadap plaintif berkenaan kerugian jikalau plaintif gagal dalam litigasinya (lihat perenggan 14). Dalam lain perkataan, kedua-dua alternatif mempunyai kesusahan yang sama dalam mengira kerugian. Dalam situasi tersebut, tidak ada justifikasi bagi sebarang perintah untuk menukarkan keadaan tersebut sehingga plaintif berjaya dalam litigasi (lihat perenggan 15).]

Notes

For cases on application for interlocutory injunction, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 2563–2570.

Cases referred to

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (refd)

Christie Soosay Nathan (Alvin John and T Prem Anand with him) (Christie Soosay Nathan & Associates) for the plaintiff.

Cecil Abraham (Nad Segaram and Sunil Abraham with him) (Shearn Delamore & Co) for the defendant.

Abdul Wahab Patail J:

BACKGROUND

[1] On 13 April 2006, the following matters came before the court for decision:

(a) Enclosure 7, the plaintiff's application for an injunction.

(b) Enclosure 11 being the plaintiff's application to amend the writ of summons and statement of claim. This was abandoned.

(c) Enclosure 23 was another application by the plaintiff to amend the writ of summons and statement of claim.

[2] Enclosure 11 was dismissed.

[3] In respect of encl 23, the court was informed by Dato' Cecil Abraham he had no objections to the application but for costs payable to the defendant. This was not objected to. Enclosure 23 was, therefore, allowed with costs to the defendant

ENCLOSURE 7

[4] Enclosure 7 is an application for an order to restrain the defendant from:

(a) Entering into, proceeding, negotiating, continuing and/or completing either in the form of a Reseller Agreement or otherwise that in any manner whatsoever relates to, contravenes, contradicts and/or causes detriment to the plaintiff's rights pursuant to the appointment of the plaintiff as the reseller of the defendant's 'CELCOM' services; and

(b) Disclosing the plaintiff's confidential information and trade secrets to third parties both, pending the disposal of this suit.

[5] Dato' Cecil Abraham told the court that his client will not be disclosing confidential information and trade secrets as per issue (b). The remaining issue before the court is the injunction to restrain the defendant from entering into reseller agreements with other parties.

THE PLAINTIFF'S CASE

[6] Sometime between the end of November and early December 2003, the plaintiff had approached the defendant's carrier and wholesale division to undertake a business venture to resell the defendant's services to the plaintiff's customers. Various meetings and discussions were held between the plaintiff and defendant's representatives culminating in discussion to draw up a reseller agreement on a simple reseller basis. On 14 January 2005, the defendant proposed for a meeting with the plaintiff to discuss the drawing up of a reseller agreement. The meeting took place on 19 January 2005 at Menara Celcom. By the end of March 2005,12,500 SIM Cards had been delivered. Further consignments of SIM Cards were delivered to the plaintiff between April 2005 and 6 July 2005. The plaintiff, through advertisements and sales, represented that the defendant agreed with and collaborated with the plaintiff. Later while drawing up a post-paid reseller agreement, there were several issues that were not resolved and culminated in a breakdown.

[7] According to the plaintiff, on 14 October 2005, a demand letter was sent to the plaintiff by Messrs Hisham Sobri & Kadir, solicitors acting for the defendant alleging that the plaintiff had misrepresented to the public by releasing newspaper advertisements, press releases and website advertisements that the defendant had collaborated and agreed with the plaintiff in launching its new prepaid package in the market, and by reason of the aforesaid the defendant intends to take steps to institute legal action and demand damages against the plaintiff. The defendant made official press statements to media companies on 15 October 2005 through Asia Public Relations Consultants Sdn Bhd and various newspapers and press releases namely *New Straits Times*, *Business Times*, *Utusan Melayu*, *Harian Metro* and *Berita Harian* all on 17 October 2005 and 19 October 2005 denying it had any association or

A contractual relationship with the plaintiff. On 19 October 2005, the defendant released a press statement in the *News Straits Times* under the *Business Times* column stating that it stood by its press statement on 17 October 2005.

[8] The plaintiff's premise for this application for an injunction is the lack of bona
B fides on the part of the defendant. It was submitted that the defendant had acted with bad faith and in grave suspicion by denying any contractual relationship with the defendant and this is further compounded by the sudden manner in denying any relationship with no plausible reasons afforded to the plaintiff. The plaintiff feared the defendant had ulterior motives to utilize all contributions by the plaintiff to the
C defendant in respect of the reseller agreement. It pointed to the common venture the defendant had taken with Air Asia as tantamount to a misappropriation of the plaintiff's property ie all the confidential information provided by the plaintiff to the defendant under a private and confidential business proposal prepared by the plaintiff for the defendant setting out the business and marketing plans, strategies and know-how in relation to the Reseller Agreement between the plaintiff and the
D defendant.

[9] It was submitted that in the event the defendant had proceeded to comply with its contractual obligations, the plaintiff would not only have made a substantial profit
E but would also have attained considerable growth and standing in the corporate world, the value of which although vital to the plaintiff, cannot be reduced to and calculated in monetary terms thus making the grant of damages alone an insufficient remedy for the breach of contract on the part of the defendant particularly in entering into a similar agreement with third parties. By letter dated 2nd March 2006, the plaintiff's solicitors informed the defendant's solicitors that it had come to the
F plaintiff's attention that the defendant had been 'negotiating and undertaking an exercise to grant the right to resell CELCOM's services to a known company in Malaysia contrary to our client's rights under the aforesaid reseller agreement'.

[10] Agreeing with the principles laid down by Gopal Sri Ram JCA in *Keet Gerald*
G *Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193, the plaintiff's counsel submitted that the plaintiff had demonstrated that there is a serious issue to be tried and the balance of convenience requires the grant of the injunction sought. It was further submitted that in the event the plaintiff is not granted the present injunction, it would be impossible for the plaintiff to track and claim the unjust
H enrichment which will accrue to the defendant when it enters into reseller agreements with third parties using the plaintiff's confidential information and contributions. By virtue of the same, the award of damages alone would be inadequate in the circumstances.

REASONING
I

[11] The submission that in the event the plaintiff is not granted the present injunction, it would be impossible for the plaintiff to track and daim the unjust enrichment which will accrue to the defendant when it enters into the reseller agreements with third parties using the plaintiff's confidential information and

contributions was very useful in bringing into clear perspective the considerations involved in the grant or refusal of an injunction in this case. Put in simple terms it is as follows.

[12] Firstly, on the basis of the pleadings in this case, there appears to be triable issues. When the pleadings disclose that there are triable issues, that is enough to warrant consideration of, if an application is made in respect thereof, injunctions. Now, the reality is that upon a trial the plaintiff might succeed. It is also possible the plaintiff might fail. Until a trial is held it is not possible to determine whether the plaintiff would succeed or fail.

[13] Secondly, the injunction as sought is defensible if the plaintiff would succeed in this litigation. But it is not defensible if the plaintiff would fail. But since it cannot at this point of time before a trial be determined who would succeed, the question before the court is, for want of a better term, the balance of convenience. The court must in practical terms in the context of this case, draw a balance between what would be:

(a) if the injunction is not granted, the damages due to the plaintiff in the event the plaintiff succeeds;

(b) if the injunction is granted, the damage suffered by the defendant if the plaintiff fails in its action.

[14] It was submitted for the plaintiff in favour of the injunction that it would be impossible for the plaintiff to track and claim the unjust enrichment and this should tilt the decision in favour of granting an injunction. But it is equally obvious, upon consideration, that it would be equally impossible to quantify and claim damages against the plaintiff's undertaking in respect of damages in the event the plaintiff failed in its litigation.

[15] In other words, both alternatives have the same difficulty in working out the damages. In that event, there is no justification for any order to change the existing state of affairs until the plaintiff shall have succeeded in its litigation.

[16] The plaintiff's application at encl 7 was therefore, dismissed with costs.

Enclosure 7 application dismissed with costs.

Reported by Loo Lai Mee